

I cannot see any principle on which other statements taken by the police should be open to inspection under section 76, save that, any person, whether an accused or not, and whether or not he can show that he requires it for any particular purpose, is entitled to "inspect" a copy of a statement made by himself.

I should make it clear that my opinion is restricted to the application of sections 74 to 76 of the Evidence Act to statements recorded by police officers. I express no view as to:

- (a) other public documents;
- (b) any right which a person may have at common law, or under rules of civil procedure to inspection of documents;
- (c) the extent of state privilege in relation to public documents.

I regret that I am unable to detect any reasonable principle on which I could rule that there is a right to inspect the rough and fair sketch plans and the motor vehicle examiner's reports (and photographs, though these were not sought). These are prepared by neutral witnesses and would be of considerable assistance to those who have to advise the clients on whether or not civil proceedings should be instituted.

However, the Public Prosecutor has assured me that, although he wishes to preserve the position that there is no right in law to inspect public documents of this nature, the police will in future be prepared to consider applications relating to those documents sympathetically, if made by or on behalf of someone with a legitimate interest in possible civil proceedings which might arise from the matters investigated.

The application must therefore fail, save in regard to the first information report, as to which there remains no dispute.

Order accordingly.

Solicitors: *Choo Chan & Wong.*

A MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. BADRULSHAM BIN BAHAROM

[O.Cr.J. (Lim Beng Choon J.) January 28, 1987]

[Alor Setar — Criminal Trial No. 31 of 1984]

Criminal Law — Dangerous drugs — Possession of 409.3 gms cannabis — Whether accused had knowledge of possession — Meaning of "possession".

C *Evidence — Cautioned statement — Whether made voluntarily and admissible — Dangerous Drugs Act 1952, s. 37A(1)(b).*

Criminal Procedure — Sentencing policy — Possession of cannabis — Deterrent factor and in public interest.

D On November 22, 1982, the accused was ambushed by a party of police officers. He was found to be in possession of a bag which contained 409.3 grammes of cannabis. He was accordingly charged under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) ("the Act") for trafficking in 409.3 grammes of cannabis, an offence punishable under section 39B(2) of the Act.

E On November 26, 1982, a cautioned statement was taken from the accused and it was recorded by an inspector. When the prosecution tried to tender the cautioned statement, the learned defence counsel objected against the tendering of that statement as a prosecution exhibit on the ground that it was not made voluntarily by the accused.

F **Held:** (1) the cautioned statement was inadmissible on the ground that no proper caution was administered by the recording officer before he recorded the purported cautioned statement from the accused. The omission of the words "to answer any question" rendered the caution defective in law;

G (2) to establish possession by an accused person of any dangerous drugs or to impute him possession of the said drugs, it must first be shown that he had knowledge of the drugs which were found to be in his possession;

H (3) in considering whether an accused person has sufficiently rebutted the presumption of possession of the dangerous drugs which were found to be in his actual physical custody or under his control, it is legitimate for the court to scrutinize the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act;

I (4) in the circumstances, the accused failed to rebut the presumption under section 37(d) of the Dangerous Drugs Act 1952 and as the amount of cannabis in his possession exceeded the limit prescribed in section 37(da) of the Act, the presumption under section 37(da) is also applicable against him and he likewise failed to rebut that presumption;

(5) after taking into consideration the facts that the cannabis involved was comparatively small and that cannabis is a less deleterious drug than opium, morphine

and heroin, the proper sentence should be life imprisonment. However, as a deterrent factor and in the public interest, the court must impose six strokes of whipping. Sentence to life imprisonment would run from the date of arrest.

Cases referred to:

- (1) *Poon Heong v. Public Prosecutor* [1949] M.L.J. 114.
- (2) *Public Prosecutor v. Lee Weng Raub* Criminal Trial No. 3 of 1949 (unreported).
- (3) *Haw Tua Tau v. Public Prosecutor* [1981] 2 M.L.J. 49.
- (4) *Public Prosecutor v. Yuvaraj* [1969] 2 M.L.J. 89.
- (5) *Barret v. Public Prosecutor* [1982] 2 M.L.J. 284.
- (6) *Chiah Tian v. Rex* [1937] M.L.J. 105.
- (7) *Leow Ngee Lim v. Regina* [1956] M.L.J. 28.
- (8) *Saad bin Ibrahim v. Public Prosecutor* [1968] 1 M.L.J. 158.
- (9) *Chan Pean Leon v. Public Prosecutor* [1956] M.L.J. 237, 239.
- (10) *Ong Ah Chuan v. Public Prosecutor* [1981] 1 M.L.J. 64.
- (11) *Shaaban & Ors. v. Chong Fook Kam & Anor.* [1969] 2 M.L.J. 219.
- (12) *Srichand v. State of Maharashtra* A.I.R. 1967 S.C. 451, 453.
- (13) *Mohamed Yusof bin Haji Ahmad v. Public Prosecutor* [1983] 2 M.L.J. 167.
- (14) *Public Prosecutor v. Puteh Nordin* [1983] 2 M.L.J. 292.
- (15) *Public Prosecutor v. Mohamed Ismail* [1984] 1 M.L.J. 134.

CRIMINAL TRIAL.

Mohamed Amin Firdaus bin Abdullah (Deputy Public Prosecutor) for the Public Prosecutor.

Kartar Singh for the accused.

Cur. Adv. Vult.

Lim Beng Choon J.: The charge against the accused is as follows:

"That you, on November 22, 1982 at about 8.30 a.m. at Jalan Station in front of Alor Setar Railway Station, in the District of Kota Setar, in the State of Kedah, did on your own behalf traffic in dangerous drug, to wit, 409.3 grammes of cannabis, in contravention of section 39B(1)(a) of the Dangerous Drugs Act (1952) (Revised 1980) and that you have thereby committed an offence punishable under section 39B(2) of the same Act (Act 234)."

The case for the prosecution is quite straightforward. On November 22, 1982, the police set up an ambush. The ambush party comprised Insp. Mohd. Nawawi who was the leader of the ambush party and three other police officers, namely, D/Corp. Idrus bin Jaafar, PW3 D/Const. Ibrahim bin Hj. Sapeh, PW5, and D/Sgt. Abd. Hasir. The party arrived at the ambush place at about 8 o'clock that morning and Insp. Nawawi, PW4, with

A D/Sgt. Hasir positioned themselves near the Cathay Theatre which was about half a mile from the Alor Setar Railway Station. PW3 and PW5 positioned themselves near the canteen adjacent to the entrance of the said railway station. At about 8.30 a.m., PW3 and PW5 both saw the accused approaching the road in front of the said railway station at a distance of about 500 feet. When the accused came nearer they saw that he was carrying a white sling plastic bag, P3. The bag was slung over his shoulders and when he had walked about 20-25 feet past the spot where PW3 and PW5 were standing, these two officers went after him and upon PW3 identifying himself as a police officer to the accused and at the same time asking him to hand over the bag, the accused refused to hand it over to him. Instead the accused said to PW3: "Tiada apa-apa", indicating that there was nothing in the bag. However, PW3 snatched the bag from him and at that time the accused looked pale and he appeared to be nervous. On opening the bag, PW3 found a newspaper package inside a pink carrier plastic bag hidden in P3. Upon opening the newspaper package, PW3 found eight thin plastic wrappers containing brown paper rolls, P6A-H. As he suspected that the paper rolls contained cannabis, he thereupon arrested the accused and told PW5 to handcuff him. Thereafter, he informed Insp. Nawawi, PW4, by walkie-talkie about the arrest and the said Insp. Nawawi arrived at the scene about 5-10 minutes later. PW4 again checked the contents of P3 in the presence of the accused and then took him together with P3 and its contents in a car to the Anti-Narcotics Division at Taman Lumba Kuda. D/Sgt. Hasir and PW3 went together with Insp. Nawawi and the accused in the car. On arrival at the Anti-Narcotics Division at the Taman, the contents of the bag were taken out and PW3 and D/Sgt. Hasir counted the number of brown paper rolls in the presence of the accused and there were 770 rolls. Thereafter, PW4 lodged a report, Alor Setar Police Report 11585/82, and after making the report he questioned the accused. As a result of the questioning, the accused took Insp. Nawawi and the two police personnel to a house where one Noor Azlan bin Osman was residing. The police arrested the said Noor Azlan and another person by the name of Bakree bin Jamal.

I The last prosecution witness in the main trial was Noor Azlan bin Osman, PW7 ("Noor Azlan"), the same person who was arrested by PW4 as a result of his questioning the accused as stated earlier and who, as can be seen presently, played quite an important role in the case for the defence. At this juncture, suffice for me to state that in his

evidence, PW7 said that the white plastic bag, P3, and its contents did not belong to him. He also said that at no time did he ask the accused to collect P3 from a friend's house and to deliver it to him on the morning of November 22, 1982. The rest of the evidence of the prosecution related to the steps taken to ensure that the exhibits, particularly P6A-H, were properly packed and sealed, the sending of the exhibits to the chemist PW1 for analysis, the result of the analysis and finally the steps taken to ensure that the exhibits were properly packed and sealed for delivery to the police and the subsequent tendering of the exhibits in this court as prosecution exhibits. The chemist, PW1, testified that the exhibits P6A-H did contain 409.3 grammes of cannabis as defined in the Dangerous Drugs Act 1952 as amended by Act A491. The defence did seriously challenge the result of the chemist's analysis and the security measures taken to ensure that there had been no break in the chain of evidence relating to the recovery of the exhibits from the accused until they reached this court and tendered as evidence. In any case, I am satisfied that the result of the analysis of the exhibits P6A-H were properly carried out, the result of the analysis was correct and there has been no break in the chain of evidence regarding the movements of the exhibits until they reached this court.

On November 26, 1982, a cautioned statement was taken from the accused and it was recorded by Insp. Mohd. Ali bin Othman. When the prosecution tried to tender the cautioned statement, the learned defence counsel objected against the tendering of that statement as a prosecution exhibit on the ground that it was not made voluntarily by the accused. Thereupon I directed that a trial-within-a-trial should be held.

The *voire dire* proceedings went on for about two days and I then took upon myself to scrutinize the purported cautioned statement. Upon a careful scrutiny of the cautioned statement, I then pointed out to the learned defence counsel and the learned DPP that the so-called caution administered by the recording officer Insp. Mohd. Ali was not in accordance with the caution as stipulated in section 37A(1)(b) of the Dangerous Drugs Act 1952 ("the Act"). At the end of the mini-trial and upon submissions of the learned defence counsel and the learned DPP, I ruled that the cautioned statement was inadmissible on the ground that no proper caution was administered by the recording officer before he recorded the purported cautioned statement from the accused. I arrived at this conclusion because in the present case, the record-

ing officer, Insp. Mohd. Ali, administered the following caution to the accused before recording the statement:

"Adalah kewajipan saya memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan berkata apa-apa jua pon tetapi apa-apa jua yang kamu cakapkan samada kerana menjawab sesuatu soalan ataupun tidak bolih digunakan sebagai keterangan."

Section 37A(1) proviso (b) states:

"(b) in the case of a statement... It is my duty to warn you that you are not obliged to say anything or to *answer any question*, but anything you say... may be given in evidence."

The recording officer had not only left out the words in italics above but he also noted in the cautioned statement the following statement before he recorded the statement:

"Untuk menjawab soalan saya beliau berkata..."

In the circumstances I find that the position in the present case is similar with that in the *Poon Heong v. Public Prosecutor*⁽¹⁾ case. In that case, the Court of Appeal was considering the form of caution that was required to be administered in regulation 33 of the Emergency Regulations 1948 as amended on January 10, 1949. The words of subsection (b) of the said regulation 33 are *in pari materia* with those in subsection (b) of section 37A(1) of the Dangerous Drugs Act 1952 except for the words "at your trial" which have been omitted in the latter section, which omission to my mind is not material in determining the sufficiency of the administration of a caution under the said section 37(1)(b). The Court of Appeal adopted the proposition expounded by Spenser-Wilkinson J. in *Public Prosecutor v. Lee Weng*⁽²⁾ which suggested that the words in italics in the statutory caution had the effect of warning the accused that he was not obliged to answer any question that the recording officer should put to him. Spenser-Wilkinson J. went on to say that:

"... if questions are to be allowed, the provisions of paragraph (2) of the regulation have to be emphasized because otherwise an accused person familiar with the normal law under section 112 of the Criminal Procedure Code, but unfamiliar with the regulation might think that he was legally bound to answer the questions and to answer them truly."

As I am bound by the decision of the Court of Appeal in the *Poon Heong* case,⁽¹⁾ I therefore hold that the statement was not admissible in evidence at this trial on the ground that since the statement was elicited by the recording

officer as a consequence of the questions put by him to the accused, the omission of these words "to answer any question" rendered the caution defective in law. In the result, the caution had not been properly and fully administered to the accused before the recording of his statement. Furthermore, as a consequence of the improper caution that was administered, it raised some doubts as to the voluntariness on the part of the accused in making the purported cautioned statement.

The trial on the main case then proceeded. At the close of the case for the prosecution, the learned defence counsel elected not to submit on the issue of no case to answer. Nevertheless upon a careful scrutiny of the evidence adduced by the prosecution, I was satisfied that the prosecution had made out a *prima facie* case which if unrebutted would warrant a conviction of the accused following the principle laid down in the *Haw Tua Tau v. Public Prosecutor* case.⁽³⁾ Consequently, I called upon the accused to enter on his defence. After the three courses of presenting his case were explained to the accused, he elected to give evidence on oath. The case for the defence was simply that he had no knowledge whatsoever of the contents, *i.e.* P6A-H, found inside the white plastic bag, P3. The accused in his evidence said that on the night of November 21, 1982 at about 11.45 p.m. he was asked by his friend Noor Azlan to go to another friend's house (that friend was known by the name of Mann) to collect P3 which was said to belong to Noor Azlan. The accused went on to say that Noor Azlan required the bag on the morning of November 22, 1982. But Noor Azlan did not specify the times when he was supposed to collect the bag and when it should be delivered to Noor Azlan; he merely said that the accused was supposed to deliver the bag to him at the Cathay Theatre. It is to be noted that both Noor Azlan and the accused at that time were working in the Cathay Theatre, the former as a film operator and the latter as a car attendant. In anticipation of the accused's allegation that P3 belonged to Noor Azlan, the prosecution had earlier called Noor Azlan to be a witness for the prosecution. In his evidence, PW7, as I have said earlier, categorically denied that P3 belonged to him and that he requested the accused to collect the bag for him on the night of November 21, 1982. However, he admitted that he was arrested about 11.30 a.m. on November 22, 1982, *i.e.* about 2-2½ hours after the arrest of the accused. PW7 also admitted that he was detained by the police for 14 days and thereafter he was released

A but a restriction order was made against him restricting him to Pulau Langkawi for a period of two years. At the close of the case for the defence, the learned defence counsel in his submission laid great stress on the fact that it is quite probable that what the accused had said was the truth, namely, that he had no knowledge whatsoever of the contents of P6A-H in the offending bag. Although he conceded, quite rightly so, that the burden of rebutting the presumption under section 37(d) was on the accused nevertheless he argued that if this court should on the balance of probabilities find that the accused's version is compatible with his innocence he should be given the benefit of a doubt and be acquitted of the offence with which he is charged. In support of his argument, the learned defence counsel relied on *Public Prosecutor v. Yuvaraj*⁽⁴⁾ and also *Barret v. Public Prosecutor*.⁽⁵⁾ With due respect I agree with the principle expounded in the *Yuvaraj* case⁽⁴⁾.

As the prosecution has succeeded in invoking the presumption under section 37(d) against the accused, it behoves this court to give a correct interpretation of the word "possession" as used in the said section in order to be able to do justice to the instant case. I believe it is well settled at least by our courts that to establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must first be shown that he had knowledge of the drugs which were found to be in his possession. The earliest authority, which I could find, that expounded this principle is the case of *Chiah Tian v. Rex*⁽⁶⁾ where the then Chief Justice of Singapore said at p. 106:

"In my opinion, possession to be an offence must be possession under such circumstances that a court is justified in finding that the accused (or the servant in cases of constructive possession) was *conscious of the possession*. As Pollock C.B. put it in *The Queen v. Woodrow* 16 L.J. M.C. 122, 'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is *not aware of the possession*."

(Emphasis supplied)

This principle was expounded with greater clarity in the case of *Leow Ngee Lim v. Regina*⁽⁷⁾ at p. 31:

"In some of the cases it has been said that without knowledge there can be no possession. In others, 'in possession' has been read as 'knowingly in possession' by application of the doctrine of *mens rea*. In some instances either view leads to the same result but not in all. The *dicta* does not make what degree of knowledge is meant. Also in some of the statutes, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.

The word 'possession' is a vague and general word which cannot be closely defined. *Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.* This is recognized in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him."

(Emphasis supplied)

Then in *Saad bin Ibrahim v. Public Prosecutor*⁽⁸⁾ Yong J. was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article. Thus his Lordship said at p. 159:

"In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case."

The principle of possession with *mens rea* has been steadfastly adhered to by our courts in construing the word possession as used in section 37(d) of the Act. Although there can hardly be any dispute that the existence of this element of knowledge is necessary to establish possession the difficulties lie in applying this principle to the facts of each individual case bearing in mind that notwithstanding the shifting of the burden of rebutting possession of the dangerous drugs to the accused person upon the successful invocation of the presumption under section 37(d) of the Act, all that is required of the accused to rebut the presumption is for him to show upon a balance of probabilities that he was not aware of the dangerous drugs which were said to be under his possession. Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions. Support for this proposition can be found in a number of authorities. I need only to refer to two authorities. The first case which I would like to refer to is *Chan*

Pean Leon v. Public Prosecutor⁽⁹⁾ where it is stated:

"*Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances.* Whether these surrounding circumstances make out such intention is a question of fact in each individual case."

(Emphasis is mine)

and further down in the same report it is again stated:

"Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence."

Support for this proposition can also be found from the following two passages in the speech of Lord Diplock in a more recent case of *Ong Ah Chuan v. Public Prosecutor*.⁽¹⁰⁾ The first passage appears in p. 69 of the reported case:

"Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. *Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did.* Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in section 15 of the Drugs Act."

(Emphasis is mine)

and the second passage appears further down in the same page:

"Whether the quantities involved is large or small, however the inference is always rebuttable. *The accused himself best knows why he was conveying the drugs from one place to another* and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3."

(Emphasis is mine)

From the proposition as set out in the *Chan Pean Leon* case⁽⁹⁾ and the *Ong Ah Chuan* case,⁽¹⁰⁾ it is

clear that in considering whether an accused person has sufficiently rebutted the presumption of possession of the dangerous drugs which were found to be in his actual physical custody or under his control (as happened in the instant case), it is legitimate for the court to scrutinize the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act. Such evidence is of course not conclusive by itself; it may be overborne by stronger evidence the other way. Nevertheless, it is not wrong to say that the accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the *occasion in question*. Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.

Bearing in mind the above stated principles, I shall now evaluate the evidence of the accused. There were three fundamental infirmities in his defence. In the first place, he had no knowledge as to the approximate time when he was supposed to go to Mann's house to collect the bag neither had he any knowledge when he was supposed to deliver the bag to Noor Azlan. This is borne out by his evidence where he said that Noor Azlan did not inform him of the times for the collection and delivery of the bag. There is also no evidence to show that he himself had inquired from Noor Azlan or anyone else about the collection and delivery times. In such a circumstance, the obvious question to ask is: Would Mann be expected to sit in his house throughout the morning waiting for the accused to collect the bag which in the natural course of events is incredible? Worse is to come when the accused testified regarding his arrival at Mann's house. He said that when he went there at between 7.30 a.m. to 7.45 a.m. Mann was about to leave his house. If he chose to go to Mann's house without any knowledge of Mann's movement, and happened to catch him at just the precise time when he was about to leave his house, the accused must have the extraordinary gift of reading the mind of Mann. In the second place there is no reason for the accused to try to bring the bag to the Cathay Theatre round about 8.30 a.m. when he knew fully well that Noor Azlan would not normally go to work as a car attendant at the car park of the Cathay Theatre until noontime and the accused would also normally go to work as a film operator in the same theatre round about the same

A time since that theatre started its first show at 1.00 p.m. daily. Moreover on that particular day, that is, November 22, 1982, the accused said that Noor Azlan was busy helping out his father in the latter's business which was carried out at his office near to the Cathay Theatre. Surely it would be more sensible for the accused to make delivery of the bag at that office and not at the Cathay Theatre where Noor Azlan would not be present. It could of course be argued that perhaps the accused was taking the bag at 8.30 a.m. to that theatre to await the arrival of Noor Azlan at noontime. But the accused in his evidence said unequivocally that Noor Azlan wanted the bag on the morning of November 22, 1982 and not at noontime although the precise or the approximate time was never conveyed to him. In any event, there is also no reasonable explanation to show why he should be going to the Cathay Theatre at 8.30 a.m. when normally he would report for work at or about noontime. In his response to a question put to him by the learned DPP in cross-examination, the accused said that on the morning of November 22, 1982 he had to go to the theatre a bit earlier in order to sort out some films. Upon a question put to him by this court in order to enable him to explain, he said that on that fateful day the theatre was supposed to show a new film and he had to unwind the reels of film in order to get them ready for the show but the unwinding of the reels of film would take only between 45 minutes to 1½ hours. On a further question put to him by the learned defence counsel, he said that the new film was not given to him but was kept in the manager's office under lock and key and it would be delivered to him when it was about to be shown at 1.00 p.m. on that day. In view of this evidence, it is not possible for me to draw any inference in his favour because in the final analysis the question as to why he had to go to the theatre at 8.30 a.m. when apparently no one would be there remained unanswered. The worst inference that can be drawn from this evidence is that probably there was a conspiracy between the accused and Noor Azlan whereby the accused was supposed to collect P3 with its contents from Mann's house and to deliver it to Noor Azlan at the theatre at an unusual hour when nobody would be at the theatre to witness the delivery. Such an inference would obviously be detrimental to the defence. But I am not inclined to draw and would not draw any such inference in the absence of any concrete evidence to support such a shady transaction.

In the third place, the accused said in his evidence that it would only take 10-15 minutes'

walk from the Cathay Theatre to Mann's house and return. As Noor Azlan wanted the bag to be delivered to him on the morning of November 22, 1982 as asserted by the accused, Noor Azlan must need it quite urgently. Besides the accused asserted that the bag belonged to Noor Azlan. In such circumstances, it is highly incredible that Noor Azlan could not spare just 10-15 minutes to go to Mann's house himself to collect his own bag which contained the dangerous drugs in question. It is rather remarkable that he would rather prefer to trust the accused "an innocent virgin" (borrowing the words used by the learned defence counsel to describe Noor Azlan) to collect it on his behalf and to take the risk of the accused unzipping the bag and his discovery of the prohibited drugs contained therein. No reasonable drug trafficker would put himself in such a dangerous situation.

Apart from the infirmities in the defence as stated above, it is also quite incredible that the accused would be so willing to collect the bag on behalf of Noor Azlan merely because Noor Azlan asked him to do so since he was staying near Mann's house. In the natural course of human conduct, one would expect a person in the shoes of the accused to ask Noor Azlan some obvious questions such as: (i) why did he leave his bag with Mann? (ii) what time was he supposed to go to Mann's house to collect the bag? (iii) why could not the delivery of the bag be made at the office of Noor Azlan's father? and (iv) why did he need the bag so urgently? A reasonable person would even go further to ask Noor Azlan why he himself could not spare 10-15 minutes to collect the bag and what was contained in the bag. Furthermore the accused upon the purported receipt of the bag from Mann had every opportunity to unzip it and acquaint himself with its contents. It would take just a couple of seconds for him to unzip the bag and to find the things that were inside the bag. Yet he said he did not do anything of the sort. Upon a careful analysis of the evidence of the accused, I am satisfied that the purported collection of P3 from Mann and the intended delivery of it to Noor Azlan is not only improbable but highly incredible.

Far from casting any doubt on the case of the prosecution, the evidence of the accused when viewed in the light of the prosecution's evidence goes some way to support the case for the prosecution for the following reasons. In the first place, I find as a fact that when PW3 identified himself to the accused and asked him to hand over the white bag, P3, the accused was not willing

A to do so and in response to the question of PW3 as to what was in P3 he said "Tiada apa-apa" meaning that there was nothing in P3 (this was admitted by the accused himself). Thereupon PW3 had to take P3 from him in order to inspect the contents of P3. I also accept the evidence of PW5 when he said that the accused looked pale and frightened when PW3 asked the accused for the bag. This evidence by itself may not fully bear out the conclusion that the accused had knowledge of the contents of P3 but it certainly throws some light in my consideration of the mental element of knowledge of the accused at the material time. In the second place, I also find as a fact that the accused did not inform PW3, PW4 or PW5 that the white plastic bag, P3, belonged to Noor Azlan when he was arrested near the Alor Setar Railway Station. PW4 in his evidence said that the accused brought out the names of Noor Azlan and Bakree bin Jamal only when he was detained in the Anti-Narcotics Division at Taman Lumba Kuda when PW4 started to question him and that was a couple of hours later. I have no reason to disbelieve PW4 as his evidence is corroborated to a certain extent by PW3 and PW5 when they said in evidence that the accused did not at any time mention the name of Noor Azlan at the scene of the arrest. Moreover, the fact that the accused brought out the names of the two persons only at the Anti-Narcotics Division at Taman Lumba Kuda when he was questioned by PW4 was borne out by PW5 when he also said in his evidence that Noor Azlan and Bakree bin Jamal were arrested at about 11.00 a.m., that is to say, about two hours after the arrest of the accused. Besides, if the accused had told PW3, PW4 or PW5 about Noor Azlan and agreed to lead them to his house at the time of his arrest at the said railway station one would hardly imagine that PW4 would not have proceeded immediately to Noor Azlan's house instead of wasting precious time in bringing the accused to the Anti-Narcotics Division at Taman Lumba Kuda and carrying out the counting of the brown paper rolls and lodging of a report. H PW4 is a senior police officer and has had much experience in the investigation of drug trafficking cases and he must know that immediate action was necessary upon receipt of information regarding any suspects in such cases. This proposition lends further support to my finding that the accused did not inform PW3, PW4 and PW5 when he was arrested at the said railway station. So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one

would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3. On this point, the learned defence counsel suggested that when the accused blurted out the words "Tiada apa-apa" one must bear in mind that when the accused was confronted by two police officers who snatched away the bag from him and thereupon handcuffed him the accused must have been in a state of shock and confusion. Any normal human being would, in such circumstances, so said the learned defence counsel, lose his sense of rational thinking; hence the accused blurted out those words. Even if I were to accept this contention (which I do not), I cannot see how it would assist the accused for the simple reason that when PW4 arrived at the scene some 5-10 minutes later the accused still failed to reveal to PW4 that the bag, P3, belonged to Noor Azlan. Surely by that time the mental shock and confusion undergone by the accused would have greatly diminished if not completely ceased to exist.

In the second place, there was nothing in P3 to show that it belonged to Noor Azlan which the accused himself acknowledged. In the third place, Noor Azlan himself was called by the prosecution as a prosecution witness, PW7. His evidence (for all its worth) comprises a total denial of his ownership of P3 and that on the night of November 21, 1982 he requested the accused to collect it on his behalf. I use the word "for all its worth" guardingly because in the circumstances one would not expect PW7 to admit that P3 and its contents did belong to him at the material time. However that may be, his evidence cannot be ignored completely by this court; it may carry very little weight but it still has to be taken into consideration along with the rest of the evidence. The learned defence counsel, however, contended that the evidence of PW7 would not warrant a moment's notice because since he was detained for 14 days under section 117 of the Criminal Procedure Code and subsequently he was placed under a restrictive order it must necessarily follow that the police had collected quite strong "evidence" of his involvement in the drug trafficking which is a subject of the charge against the accused. Therefore, so said the defence counsel, it was more probable than not that the accused's assertion that P3 belonged to Noor Azlan was true. I cannot accept this argument for the following reasons.

First, I consider the use of the word "evidence" by the learned defence counsel in his

A submission as somewhat misleading in that the purpose of section 117 is to enable the police to seek a remand order from the magistrate when they have well-founded information to warrant such a detention. But such information might not necessarily be sufficient evidence that can lawfully be used in a court of law to establish a *prima facie* case against Noor Azlan. In support of this proposition, I would refer to the case of *Shaaban & Ors. v. Chong Fook Kam & Anor*⁽¹¹⁾ where Lord Devlin said at p. 221:

C "Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie proof* is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage."

(Emphasis supplied)

D Further down the same page, Lord Devlin went on to say:

"If the investigation cannot be completed in 24 hours and there are grounds for believing that the accusation or information is well founded, under section 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole."

E These observations suggest that the detention of a suspect for a period of 15 days does not necessarily mean that by the end of that period the police must have invariably made out a *prima facie* case against the suspect. Although the police might well have some well-founded information to get a magistrate's order to remand the suspect for the full period nevertheless at the end of it all the police might still find that the evidence collected would not be sufficient to make out a *prima facie* case. This is exactly what happened in the instant case concerning the detention of Noor Azlan and Bakree bin Jamal. All that the evidence in the instant case has shown is simply this: it is true that the police had detained Noor Azlan for 14 days but nevertheless they could not collect sufficient evidence that could lawfully be used in court to fasten PW7 with the offence with which the accused was charged. This clearly shows that there is no basis upon which the accused could have grounded his allegation or his assertion against PW7. Although PW7 might be involved in the drug trafficking but this court is left in the dark as to the extent of his involvement. Be that as it may, the involvement of PW7 by itself cannot be construed as cogent evidence that the accused was not in possession with *mens rea* of P3 and its contents at the material time. To accede to the learned defence counsel's suggestion would mean that I would have to arrive at such a conclusion

unsubstantiated by evidence except the bare word of the accused which is incompatible with the evidence adduced in this court. More significantly, I would also have to assume that the police deliberately let loose a guilty person and instead chose to charge an innocent man for an offence in which he played very little or no part at all. This I cannot and will not do in the absence of any evidence. Basing on all these pieces of evidence, the upshot is that they strongly bear out the conclusion that the accused had knowledge of the contents of P3. More importantly, these pieces of evidence also fully bear out my conclusion that the collection of P3 by the accused as asserted by him on behalf of and for later delivery to Noor Azlan at the Cathay Theatre on the morning of November 22, 1982 is from its inception highly incredible. In any event, the involvement of PW7, and for that matter Bakree bin Jamal, in the drug trafficking operation which is the subject of the charge against the accused cannot in any way lessen the guilt of the accused because at its highest, it might be a joint venture and it is fortunate for PW7 and Bakree bin Jamal that the police were not able to charge them jointly with the accused.

It is appropriate at this stage for me to deal with two further points raised by the learned defence counsel in his submission. First, he drew the attention of this court to the fact that the accused did not put up a struggle or make any attempt to run away. The short answer to this point is that from the evidence I am satisfied that the accused had no opportunity to do so as he was suddenly surrounded by PW3 and PW5 before he could even begin to realize that he was in danger of being arrested. As he was caught red-handed with the dangerous drugs in his possession and he had knowledge of the said drugs, what else could he do apart from saying that there was nothing in the bag.

The next point raised by the learned defence counsel was more serious. He contended that since the prosecution had failed to send the exhibits particularly the eight packets wrapped in thin plastic sheets (P6A-H) to the chemist to check for finger prints, he urged this court to invoke the presumption under section 114(g) of the Evidence Act 1950 (Act 56) against the prosecution on the ground that had the prosecution carried out the finger print test it would probably show the existence of the finger prints of Noor Azlan and Bakree bin Jamal on the thin plastic coverings of P6A-H thereby revealing that these two persons were involved in the drug trafficking transaction in

A question. The failure of the police to do so also resulted in a disadvantage to the accused in that "had the finger prints of the accused not been found on the exhibits" the accused would be entitled to an acquittal. The learned defence counsel was not able to cite any authority in support of his contention. The answer to the learned defence counsel's contention can, however, be found in the following passage of *Sarkar on Evidence* 12th Ed. at p. 1045 where it is stated:

C "Adverse inference can be drawn if there is withholding of evidence and not merely on account of failure to obtain evidence."

(Emphasis supplied)

In the present case, the prosecution had clearly established that the accused was in actual physical custody and control of P3 and its contents. From the totality of the evidence, the prosecution had also clearly established that the accused had the necessary knowledge of P6A-H and the nature of the dangerous drugs in question. In the circumstances, I cannot find fault with the police for failing to send the exhibits to the chemist in order to carry out finger print tests. The contention of the learned defence counsel, with due respect, amounts to nothing more than to ask this court to determine not whether there was sufficient evidence adduced before this court to warrant a conviction of the accused but to determine that the methodology of the police investigation must be 100% correct regardless of the fact that the police had gathered more than sufficient evidence to sustain a conviction of the accused. I cannot lend a judicial countenance to such a contention. In any event as held by the Indian Supreme Court in *Srichand v. State of Maharashtra*:⁽¹²⁾

H "(9) Further, an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained, it cannot be said what that evidence would have been and, therefore, no question of presuming that that evidence would have been against the prosecution, under section 114, Illustration (g) of the Evidence Act, can arise."

Besides, the learned defence counsel had failed to question any of the police witnesses as to why they did not send the exhibits for a finger print test. Had such a question been put to any one of them, a satisfactory explanation might have been given. I cannot therefore yield to the suggestion of the learned defence counsel particularly when I am fully satisfied from the totality of the evidence that the accused had knowledge of the dangerous drugs in question. Furthermore as the bag, P3, and

its contents were in his possession at the material time he had ample opportunity to dispose of the dangerous drugs in question when he chose to do so.

Before I conclude, I should also mention that I can find no reason to question the credibility or veracity of the police witnesses who testified for the prosecution. In scrutinizing the evidence of these witnesses, I took into consideration not only the demeanour of each of the said witnesses but also the consistency of their evidence and in the final analysis I am satisfied that on the whole, they are witnesses of the truth.

In the circumstances, I hold that the accused has failed to rebut the presumption under section 37(d) of the Dangerous Drugs Act 1952 (Act 234) and as the amount of cannabis in his possession exceeded the limit prescribed in section 37(da) of the Act, the presumption under section 37(da) is also applicable against him and he likewise failed to rebut that presumption. I therefore hold that the accused is guilty as charged. He must therefore stand convicted of the offence with which he is charged.

I now come to the question of sentence. In mitigation, the learned defence counsel urged this court to exercise its discretion not to impose the death sentence on two grounds, viz. (i) the quantity of the cannabis involved was only 409.3 grammes and (ii) cannabis is a less deleterious drug than opium, morphine or heroin and he relied on the following authorities to support his submission: *Mohamed Yusof bin Haji Ahmad v. Public Prosecutor*,⁽¹³⁾ *Public Prosecutor v. Puteh Nordin*⁽¹⁴⁾ and *Public Prosecutor v. Mohd. Ismail*.⁽¹⁵⁾ In all these three cases the quantities of cannabis involved were much more than 409.3 grammes. The learned defence counsel also urged this court not to impose whipping on the authority of *Public Prosecutor v. Puteh Nordin*.⁽¹⁴⁾ On the other hand, the learned DPP submitted that the question of weight and type of dangerous drugs involved were irrelevant and the only relevant issue is that the accused has been found guilty of trafficking in dangerous drugs. He had committed the offence without any redeeming feature.

After taking into consideration the facts that the quantity of the cannabis involved was comparatively small and that the cannabis is a less deleterious drug than opium, morphine and heroin, I think the proper sentence should be life imprisonment. However, as a deterrent factor and in the

A public interest, I must also impose six strokes of whipping. I accordingly sentence the accused to life imprisonment which is to run from the date of his arrest with six strokes of whipping.

Convicted and sentenced accordingly.

B Solicitors: *Kartar Singh & Co.*

C **PUBLIC PROSECUTOR v. FORSTER FRANK
EDALD HEINRICH**

[O.Cr.J. (Edgar Joseph Jr. J.) January 21, 1987]

[Penang – Criminal Trial No. 58-9-84]

D *Criminal Law – Dangerous drugs – Cannabis resin – Trafficking on own behalf – Presumption – Defence of no knowledge – Rebuttal of presumption – Dangerous Drugs Act 1952, ss. 37(d) & (da) & 39B(1)(a).*

E *Evidence – Affidavits of two companions of accused – Deponents abroad – Admissibility – Evidence Act 1950, s. 32(c) – Criminal Procedure Code (F.M.S. Cap. 6), s. 424(i)(d).*

On November 20, 1983, at about 1.15 a.m. Inspector Bhupinder, accompanied by Corporal Yusoff and hotel caretaker Yu, checked room 48 (in the Swiss Hotel in Chulia Street, Penang) occupied by three male German tourists, the youngest of whom was the accused, a 21-year-old bank clerk, who was charged with trafficking, on his own behalf, in a dangerous drug, to wit, 239.7 grammes of cannabis resin, in contravention of section 39B(1)(a) of the Dangerous Drugs Act 1952. On arrival at room 48, Inspector Bhupinder knocked the door. The light of the room went on and about one or two minutes later, the door of the room was opened apparently by the accused. In the room there were three large travelling bags, two of which were checked by Corporal Yusoff and the third bag (which belonged to the accused) was checked by Inspector Bhupinder, who claimed that he recovered a sling bag from inside the side zip pocket of the accused's travelling bag. He further claimed that from inside the sling bag he recovered a pink plastic bag in which were three condoms, each of which contained a black substance later certified by the chemist to be a dangerous drug within the meaning of section 2 of the Act, i.e. 239.7 grammes of cannabis resin. Inspector Bhupinder said that he also recovered, from inside the sling bag, a passport and three air tickets, all belonging to the accused. The accused's two companions were not arrested or even interviewed and were allowed to get away scot free. The learned judge called upon the accused to enter upon his defence.

The accused gave evidence on oath. He said that when Inspector Bhupinder checked his travelling bag, it was covered with a towel. He had no recollection as to who had placed the towel there. Inspector Bhupinder removed the towel and underneath it was the pink plastic bag. The accused said one of his companions said to him in German